SUPREME COURT, U. S.

Supreme Court
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JUN 8
MICHAEL RODAK,

73 - 1847

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

CLIFFORD R. AND DOROTHY F. BURGESS, Pro Se
Petitioners

1086 Laurel Avenue
Bridgeport, Connecticut 06604

RONALD AND JUDITH FABRIZI
Respondents

Counsel, Lawrence Merly
1032 Main Street
Bridgeport, Connecticut

On Appeal From

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Number 73-2154

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Appended Herein:

Copy of Connecticut's new Prejudgment Attachment Statute 73-431

Copy of District Court's Opinion and Judgement

Copy of U.S. Appeal Court's Judgement

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(A)OPINIONS DELIVERED IN THE COURT BELOW:

The Petitioners were appellants in the herein captioned appeal from the United States District Court for the District of Connecticut in which the United States Court of Appeals for the Second Circuit affirmed the District Court's ruling to deny removal by remanding a state civil case back to state court.

The District Court's opinion which was affirmed by the United States Court of Appeals was "Petitioners Removal Action was untimely of the thirty-day period allowed for delayed removal of 28 U.S.C. 1446 (B) inasmuch as there was no new development in the suit that warrants federal jurisdiction on removal."

(B) GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED:

The jurisdiction of the Supreme Court is invoked on grounds that Petitioners' Federal Civil Rights of Due Process and Equal Protection under the Law were denied by Connecticut's Prejudgment Attachment Statutes which are repugnant to and in conflict with the Due Process Protections of prior notice and prior hearing that are Constitutionally required by the Due Process Clause of the Fourteenth Amendent to the Constitution of the United States.

The prejudgment denial of Petitioners' property which was secured by real estate attachment statute 52-279 was rendered unauthorized and illegal when the said

real estate attachments and state court's "In Rem" and "In Equity"Jurisdiction were rendered invalid by the legislation of Connecticut's new prejudgment Attachment Statute 73-431 on May 30, 1973 which nullified Connecticut's old Attachment Statute 52-279. Consequently, the Prejudgment denial of Petitioners' property from the date of May 30, 1973 to the present moment constitutes illegal trespass of Petitioners' property in the absence of the new statute's authorization by Respondent's failure to secure same.

Connecticut's old Prejudgment Attachment Statute 52-279 was repugnant to the Due Process Protections Constitutionally required in it's failure to provide by statutory scheme the due process protections of prior notice and hearing before the prejudgment denial of property.

Connecticut's new Prejudgment Attachment Statute 73-431 is repugnant to the Due Process Protections Constitutionally required in it's Section 7 which authorizes the prejudgment denial of property previously secured before the new statute's enactment by a hearing subsequent to the "prejudgment denial" at the discretion of a state court plaintiff for the purpose of determining "probable cause" and in it's Section 4, as related to Section 7, which authorizes the "prejudment denial" previously secured to be effective on the date of the subsequent hearing by authorizing a state court plaintiff to update the writ, summons and complaint to the date of the subsequent hearing.

(i) The decision sought to be reviewed was issued by the United States Court of Appeals for the Second Circuit on February 1, 1974.

(ii) Petition for Rehearing of the Judgment was timely filed on February 13, 1974 and was denied by the said circuit court of appeals on February 26,1974. Petition to Stay the Mandate which was due to issue on March 5, 1974 was timely filed on March 4, 1974 and was denied by the said circuit court of appeals on March 19 1974.

(iii) The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari are of Removal Statute 28 U.S.C. 1443 (1) (as amended July 2, 1964) as in 28 U.S.C. 1447 (D) which provides review by appeal or otherwise and 28 U.S.C. 1257 (3) pursuant to state statute drawn in question on grounds of its being repugnant to the Constitution, treaties or laws of the United States and by Rule 19 (B) of the rules of the Supreme Court which provides review of appeal court decisions that conflict with Supreme Court decisions regarding the Constitutionality of state statute and which has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision.

(C) QUESTIONS PRESENTED FOR REVIEW

Did Connecticut's new prejudgment at-

tachment statute 73-431 at its inception on May 30, 1973 repeal Connecticut's old prejudgment attachment statute 52-279 and, therefore, cause the prejudgment denial of Petitioners' property by real estate attachment thereunder to become unauthorized and invalid and State Court's related "In Rem" and "In Equity " jurisdiction to become nullified?

Did the unauthorized and illegal prejudgment denial of Petitioners' property and the Respondent's failure to seek or secure statutory authorization under the new statute's Section 7 before Removal constitute a formal expression of denial by state authority of Petitioners' federal civil rights of due process and equal protection under the law during the period May 30,1973 to the present moment?

Did the new statute's Section 7 and Section 4, as applies to Section 7, constitute a formal expression of denial of Petitioners' said Federal Civil rights on May 30, 1973 and thereafter by it's authorization of prejudgment denial of property previously secured under the said old statute in the absence of prior notice and prior hearing and by it's authorization of a hearing more than three years subsequent to the said prejudgment denial of Petitioners' property at the discretion of a state court plaintiff for the purpose of determining "probable cause" with provision for making the said prejudgment denial of property effective on the date of such subsequent hearing by authorizing the updating of the writ, summons and complaint?

Is the said new statute legally defective and inoperative for one or more of the following reasons:

(i) Section 7 and 4 of the said new statute are absent the amendment or repeal of Sections 2 and 3 which causes conflict within the statute that is too ambiguous to be considered legally operative inasmuch as Section 2 prohibits prejudgment denial of property, defined as "Prejudgment Remedy", in Law or in Equity outside the said statute, Section 3 provides a four day prior notice and hearing as a requisite to the authorization of prejudgment remedy; while Sections 7 and 4 authorizes prejudgment remedy previously secured before the new statute's enactment with a hearing subsequent to prejudgment remedy and authorizes the previously secured prejudgment remedy to become effective on the date of the hearing by authorizing the updating of the writ, summons and complaint.

(ii) Section 2 and 3 are no less effective than Sections 7 and 4 in the absence of amendment or repeal.Therefore, Sections 7 and 4 are legally defective and inoperative in the absence of the repeal or amendment of Sections 2 and 3.

(iii) Section 7 is legally unable to speak alongside the old statute in the absence of the repeal or amendment of the old statute.

Was the Appeal Court's decision in conflict with the Supreme Court's ruling of LYNCH v. HOUSEHOLD FINANCE 405 U.S.538 (1972) which upheld the Constitutional Protections of Due Process required by

Amendment Fourteen?

Did the appeal court properly rule by affirming the district court's decision to remand the state case back to state court at a time when state court's "In Rem" and " In Equity" jurisdiction was nullified?

Is Connecticut's new prejudgment attachment statute 73-431 in it's present form repugnant to and in conflict with the Due Process Protections of the United States Constitution's Fourteenth Amendment that requires prior notice and prior hearing aimed at establishing the validity or probable validity of the underlying state claim before the alleged debtor can be deprived of his property?

Did the United States Court of Appeals and the District Court as a federal tribunal have the power to issue orders to protect the federal jurisdiction that Petitioners' Removal Action conferred upon Federal District Court?

Was it the responsbility of the federal district court to protect the federal civil rights of the Petitioners upon removal and to determine the invalid status of the state action which was apparent on the face of the files?

Was the Petitioners' Removal Action timely of the 30-day period allowed for delayed Removal Actions as provided by 28 U. S. C. 1446 (B)?

Were the acts of the Petitioners that

were complained of by the Respondent's state action "acts of liberty" derived from the Constitution and, therefore, acts that were immune from state court prosecution...(1) the act of purchasing and owning real estate...(2) the act as a real estate broker, in compliance with real estate regulations, statutes, custom and usage, of failing to legally convey Respondent's alleged oral offer on real estate that was admittedly unconditioned and without deposit?

Were the Petitioners' Federal Civil Rights of Due Process and Equal Protection under the law denied by the unethical and illegal attachment of real estate which involved prejudgment denial of Petitioners' property by the September 10, 1970 writ, summons and complaint that was absent the deputy sheriff's return and by a second writ of attachment dated September 14, 1970 which was issued in the absence of a complaint and summons?

(D) CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED:

The Constitutional provisions and statutes which the case involves are the Due Process Protections of Prior Notice and Prior Hearing and Equal Protection under the Law that are required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The said Rights are Civil Rights protected by 42 U.S.C.A. 1983 and 1985, by Federal criminal statute 18 U.S.C. 241 and by federal Removal Statute 28 U.S.C. 1443 (1).

(E) STATEMENT OF THE CASE:

The prejudgment denial of Petitioners' property under circumstances of an invalid state action would not have been possible and would not be possible at this time if Connecticut's old prejudgment attachment statute 52-89 / 52-279 and Connecticut's new prejudgment attachment statute 73-431 afforded the Due Process Protections of prior notice and prior hearing aimed at establishing the validity of the state case as required by the Fourteenth Amendment's Due Process Clause.

The basic purpose of Due Process under attachment statutes is to limit prejudgment denial of property to valid state actions. The Respondents have seen fit to continue the enforcement of the unauthorized real estate attachments and the illegal prejudgment denial of Petitioners' property thereunder and the Respondent's attorney has attempted to operate under the new statute's Section 7 with attested representation as an officer of the court that there is probable cause that judgment will render in favor of the Respondents. The question of the state action's validity and the absence of Due Process to establish that validity before prejudgment denial of property is relevant and basic to the Petitioners' Removal Action.

The Petitioners' entrapment of prejudgment denial of property was initiated by way of a state action in September, 1970. The state case, groundless

in nature, was "In Rem" and "In Equity" inasmuch as specific performance of real estate through constructive trust was demanded on grounds of an alleged oral offer that was admittedly unconditioned and without deposit. Fraud was alleged that was purportedly provable by the parol evidence testimony of the Respondent himself, and fifty thousand dollars damages were demanded for injury alleged to have been "great disappointment"...the state action was initiated on September 10, 1970 by way of Connecticut's prejudgment attachment statute 52-279, and the pretext of said statute under which prejudgment denial of Petitioners' property was secured by writ, summons and complaint dated September 10, 1970 that affected the subject property described as Fairview Avenue, Bridgeport and by a second writ of attachment dated September 14, 1970 under which prejudgment denial of Petitioners' property was secured that affected Petitioners' other three parcels of real estate described as Laurel Avenue Hollister Avenue, and Arctic Street, all in Bridgeport, Connecticut.The September 10, 1970 writ, summons and complaint was absent the deputy sheriff's return. The September 14, 1970 writ of attachment was absent a summons and complaint. Defective Service of Process was made at a vacant house of the subject real estate which was not the Petitioners' place of abode. ...The said state action was of pending status when removed to Federal District Court by the Petitioners as defendants under the state case.

Because of the groundless and illegal

nature of the state case, Petitioners removed the state case unsuccessfully on two other occasions basing those other removal actions separately on (1) the groundless nature of the state case and (2) the defective service of process at a vacant house which was not the Petitioners' principle place of abode.

The Removal Statute 1443 (1) does not limit it's use during the pending status of a state case before trial and there was no restriction to remove the case a third time.

The removal of the state case was initiated under 28 U. S. C. 1443 (1) on grounds:

1. The Petitioners will be denied or cannot enforce their federally protected rights in state court.

2. The Acts of the Petitioners that were complained of were Acts of Liberty derived from the Constitution and were therefore, Acts that were clearly a matter of Right, immune from state court prosecution.

Petitioners' Removal Action was instituted on June 8, 1973, just eight days subsequent to the enactment on May 30, 1973 of Connecticut's new prejudgment attachment statute 73-431, which affected the Petitioners' Federal Civil rights and was clearly in compliance with the thirty-day requirement for delayed removal actions before trial as provided by 28 U. S. C. 1446 (B).

The thrust of Petitioners' Removal

Action was pursuant to Constitutionally defective prejudgment denial of Petitioners' property by Connecticut's old prejudgment attachment statute 52-279 which was secured in the absence of the Due Process Protections Constitutionally required and which Connecticut's new attachment statute 73-431 authorizes at the discretion of the Respondent by way of a hearing more than three years subsequent to the prejudgment denial of property.

The Petitioners showed the court the groundless and illegal status of the said state action which was related to issues that were without legal prospects of succeeding, and which was related to illegal and unauthorized real estate attachments initially secured that failed to even comply with the requisite of state statute inasmuch as the September 10,1970 writ, summons and complaint was absent the deputy sheriff's return and the September 14, 1970 writ was absent the legally required summons and complaint.

More importantly, the Petitioners' showed the court that the prejudgment denial of property so secured was Constitutionally defective and that the new statute's authorization of the said prejudgment denial of property previously secured under the old statute would result in further denial of Petitioners' Federal Civil Rights.

Further, Petitioners showed the court ...that Connecticut's old attachment statute 52-279 became nullified on May 30,'73

by the enactment of Connecticut's new attachment statute 73-431 which by it's Section 2 prohibits "prejudgment denial of property" in law or in equity outside the said new statute...that the prejudgment denial of property so secured under the old statute 52-279 was illegal and invalid since May 30, 1973 and thereafter because of the nullity status of the old statute and because the Respondents had failed to seek or secure statutory authorization of the prejudgment denial of property under the new statute's Section 7 prior to removal of the state case .... and that state court's "In Rem" and "In Equity" jurisdictional power, which was derived from and controlled by the old statute 52-279 was,therefore, null and void.

During the time of Removal, to and including the present moment, state court jurisdiction was nullified and is at this time non-existant. Consequently, at the time the district court remanded the state case back to state court, and at the time the Appeal Court affirmed that ruling, the only apparent jurisdiction of any court was the federal jurisdiction that the Petitioners' Removal Action conferred upon the District Court.

The said circumstances of unauthorized and illegal prejudgment denial of property by real estate attachments related to the nullified status of the old statute 52-279 and the nullified status of state court's jurisidction from May 30, 1973 to the present moment, has caused illegal trespass of Petitioners' property and denial of Petitioners' federal civil

rights of Due Process and Equal Protection under the Law. Such circumstances and the fact that the provisions of Section 7 of the said new statute which authorizes the same prejudgment denial of property previously secured under the old attachment statute 52-279 was clearly a formal expression of denial by state authority, sufficient to warrant federal jurisdiction under the said Removal Statute.

The said issues raised by the Petitioners' appeal and Removal Action were unchallenged by the Respondents' failure to file a reply brief to Petitioners' Appeal and by their failure to appear at the hearing.

(F) ARGUMENT OF REASONS FOR THE ALLOWANCE OF THE WRIT

The Appeal Court's decision has so far departed from the accepted and usual course of judicial proceeding and so far sanctioned such departure by the District Court, as to call for an exercise of this Court's power of supervision inasmuch as the said decision has allowed the remand of the state case back to state court at a time when the jurisdiction of state court was nullified and nonexistant, and inasmuch as the court's decision has allowed illegal trespass of Petitioners' property to continue under the unauthorized prejudgment denial of property secured by real estate attachments under the old prejudgment attachment statute 52-279 which became nullified by Connecticut's new prejudgment attachment statute 73-431 on May 30, 1973.

Further, the Appeal Court's decision to sanction the District Court's decision has drawn into question the Constitutionality of Connecticut's new prejudgment attachment statute 73-431, which by it's enactment has caused illegal trespass of Petitioners' property and deprivation of Federal Civil Rights, and which by it's provisions has authorized prejudgment denial of property that is repugnant to the Procedural Protections of Due Process that are Constitutionally required. The Appeal Court's decision is therefore, in conflict with Supreme Court decisions regarding the Constitutionality of state statute which were cited by the Petitioners in Supreme Court Case Law of SNIADACH v. FAMILY FINANCE 395 U. S. 337 (1969) which made clear that the garnishment of wages was unconstitutional in the absence of prior notice and hearing. FUENTES v. SHEVIN 407 U. S. 67 (1972) which made clear that all types of property interest were protected by the basic Due Process requirements, and of LYNCH v. HOUSEHOLD FINANCE 405 U. S. 538 (1972) which made clear that Connecticut Prejudgment Attachment and Garnishment Statutes were in violation of the Due Process Protections required by the Fourteenth Amendment's Due Process Clause.

The said Court's decision was in conflict with the Supreme Court decision of LYNCH v. HOUSEHOLD FINANCE and the Constitutional Protections that the said Supreme Court decision upheld. Petitioners believe that their appeal involves questions of Major Constitutional Issue that involve the denial of Federal Civil Rights

of Due Process Protections and Equal Protections under the Law by Connecticut's new Statute 73-431 that is affecting the Petitioners' said Federal Civil Rights and the Civil Rights of other Connecticut property owners under like circumstances and that such questions require review by the United States Supreme Court.

Connecticut's new Prejudgment Attachment Statute 73-431 was prompted by the said Supreme Court decision of LYNCH v. HOUSEHOLD FINANCE which made clear that the statutory scheme of Connecticut's Prejudgment Attachment and Garnishment Statutes were in violation of the procedural protections of Due Process that require prior notice and prior hearing, and that the prior hearing must be aimed at establishing the validity or at least the probable validity of the underlying state action before the alleged debtor can be deprived of his property.

On May 30, 1973,Connecticut's new Prejudgment Attachment Statute was enacted for the purpose of curing the Constitutionally defective statutory scheme of Connecticut's Prejudgment Attachment and Garnishment Statutes and to make legal the otherwise illegal statutory scheme of prejudgment denial of property thereunder.

The said statute, however, because of its ambiguity, statutory defect and conflict with Constitutional Requirements, has failed to convey the Due Process Protections that it sought to provide.

Section 1-D provides prejudgment

denial of property, defined as "prejudgment remedy," to both garnishment and attachment of property.

Section 2 prohibits "prejudgment remedy" in Law or in Equity outside the said new statute.

Section 3 and Section 4 provides prior notice and prior hearing as a requisite to the authorization of "prejudgment remedy" by requiring a state court plaintiff to give a four-day notice of hearing to an alleged debtor and by requiring a plaintiff or affiant to show probable cause by sworn affidavit that judgment will be rendered in the matter in favor of the plaintiff.

Section 7 and Section 4 are in conflict with the prior notice and prior hearing requisites under Sections 2 and 3 and ambiguously authorize "prejudgment remedy" that was previously secured before the new statute's enactment in the absence of due process protections of prior notice and hearing that are Constitutionally required.

Sections 7 and 4 further authorizes its use at the discretion of a plaintiff and authorizes the up-dating of the writ, summons and complaint upon a plaintiff's showing of probable cause at a hearing subsequent to the prejudgment denial of property, making the prejudgment denial effective on the date of the subsequent hearing.

The said statute is statutorilly defective inasmuch as Section 7 does not con-

tain an amendment or repeal of the provisional requirements that are authorized by the statutes Section 2 and 3, as in JOHNSON v. CITY OF CINCINNATTI 450 F2D 796,

> "Intention of legislature to amend or repeal must be clear and manifest."

In essence, the strength of each of the statute's Sections are identical and the provisions of Sections 2 and 3 are as statutorilly authorized as are the provisions of Sections 7 and 4. Clearly then, Sections 7 and 4 are legally inoperative in the absence of the repeal or amendment of Sections 2 and 3, and have caused conflict within the statute that is too ambiguous to be considered legally effective.

The said statute, in its present form, has authorized that which it sought to replace; namely, the "prejudgment remedy" that was previously secured under the old statute in the absence of the due process protections of prior notice and hearing which was considered to be in violation of Constitutional requirements by the Supreme Court in LYNCH v. HOUSEHOLD FINANCE 405 U. S. 538 (1972), SNIADACH v. FAMILY FINANCE 395 U. S. 337 (1969) FUENTES v SHEVIN 407 U. S. 67 (1972).

The said new statute is further illegal because of it's attempt to speak alongside the old statute in the absence of the repeal or amendment of the old statute, as in ELY v. VELDE 451 F2D 1130,

> "there is a strong presumption against

one statute repealing or amending another by implication, and there must be a positive repugnancy between the new and the old."

The rules governing statutory repeal by subsequent legislative action are set forth in POSADAS v. NATIONAL BANK, 296, U.S. 497, 503; 56 S. Ct. 349, 352; 80 L.Ed. 351 (1936):

"There are two well-settled categories of repeals by implication- (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment."

The only premise available is that Connecticut's new statute either repealed the old statute by implication or that the said circumstances constitute a continuation of the old statute allowing the old statute to continue to speak.

If it can be determined that the old statute was repealed by implication, the prejudgment denial of property under the old statute became invalid by such repeal and the new statute would be powerless to authorize that invalid prejudgment denial of property previously secured under the old statute.

The only other theory, would be that the new statute is a continuation of the old statute, because of its failure to clearly repeal the old statute or because of legislative intent, which allows the old statute to continue to speak. However, both the repeal and the continuation of the old statute is clearly not legally possible at the same time.

In either event, there can be no doubt that the prejudgment denial of property so secured under the old statute was accomplished in the absence of the Due Process Protections of Prior Notice and Prior Hearing that is Federally required and was, therefore, unconstitutional. The central issue raised by the said circumstances then, is whether or not the unconstitutional prejudgment denial of property so secured can somehow be considered to reach the height of constitutionality by the new statute's authorization of a hearing three and one-half years subsequent to the prejudgment denial and by the new statute's authorization to update the writ, summons and complaint to the date of subsequent hearing; or if such authorization constitutes denial of Due Process and Equal Protection under the Law in its absence of the Due Process Protections that are Constitutionally required.

The thrust of Petitioner's Removal Action, in essence, is that the new statute is as unconstitutional as the unconstitutional scheme that it attempts to authorize.

The new statute has clearly failed to convey power to the court "by statutory requirement," but instead has balanced the court's jurisdictional power in the hands of a state court plaintiff, who at his discretion, may enforce prejudgment remedy previously secured under the old statute....a concept clearly contrary to Constitutional requirements as in the mentioned Supreme Court Case Law and POTTER v APPLEBY 136 CONN. 644

> "power to attach property can only be conferred by statute."

The said statute in its present form constitutes a "special law" framed in ad hoc fashion, which is in violation of Federal Statute 48 U.S.C.A. 1471 that prohibits legislators from passing special laws granting any special or exclusive privilege, immunity or franchise,and the said statute's effect that has caused the said prejudgment denial of property to be illegal and invalid on May 30, 1973 to the present moment, constitutes a formal expression of denial of Petitioners' said Federal Civil Rights by state authority.

The said statute has, therefore,caused illegal and invalid prejudgment denial of property which constitutes illegal trespass of Petitioners' property rights and has authorized the denial of Petitioners' Federal Civil Rights of Due Process and

Equal Protection under the Law; inasmuch as Petitioners are denied the Due Process Protections of prior notice and prior hearing that are Constitutionally Required and Petitioners are denied the prior notice and prior hearing provisions of the new statute's Section 3, which are made available to Connecticut property owners, but denied to the Petitioners who have become entraped by the illegal provisions of the new statute's Section 7. Respondents are attempting to operate under Section 7 of the new statute to secure statutory authorization of the illegal and invalid prejudgment denial of property. Respondent's attorney filed a Motion in state court on September 28, 1973 under Section 7 of the new statute whereby as Commissioner of the court he attested " that there is probable cause that judgment will be rendered in the matter in favor of the Respondents". However, the said Motion was called off because the Petitioner's Removal Action was before the Appeal Court on the very same issues.

The "In Rem" and "In Equity" Jurisdiction of state court was derived from and controlled by Connecticut's old statute 52-279 and the court's jurisdiction was dependent upon its legal control of the prejudgment denial of property by real estate attachment as in MENDROSHOWICZ v. WOLFE 139 CONN. 507

> "action to set aside deeds for fraud and damages is "In Equity" and "In Rem" and basis for jurisdiction of the court is that real estate is within its legal control."

The said "In Rem" and "In Equity" jurisdiction of state court clearly became nullified when the court lost legal control of the real estate attachments by the nullified status of Connecticut's old attachment statute.

The invalid status of the state action was further apparent on the face of the state complaint and file inasmuch as the September 10, 1970 writ of attachment was absent the deputy sheriff's return and the September 14, 1970 writ of attachment was absent a summons and complaint; and inasmuch as the allegations and demands of the state action were obviously not actionable in Law or in Equity as in GALVIN v. BIRCH 97 CONN. 400

"A writ without a complaint is invalid and a nullity, the defect is not amendable, cause should be dismissed."

Respondent's allegation of fraud that was purportedly provable by the parol evidence testimony of the Respondent himself was not actionable in Law or in Equity as in KISS v. KAHN 132 CONN. 593

"Parol Evidence Rule has no application where there has been fraud alleged."

and as in CREELMAN v. ROGOWSKI 52 CONN382

"Proof of fraud must be positive and definite, evidence must be clear, precise and unequivocal."

Respondent's demand for specific performance of real estate through constructive trust and setting aside the deed on grounds of an alleged oral offer that was

admittedly not conditioned and without deposit, was not legally possible to secure as in UTLEY v. NOLAN 134 CONN. 381

> "there must be written evidence of a complete agreement. The Statute of Frauds (general statute 5982) requires that the agreement or some memorandum thereof be made in writing and signed by the party to be charged therewith or his agent."

Respondent's demand for fifty thousand dollars damage for injury alleged to have been "Great Disappointment", was not legally possible to determine as in FREDA v SMITH 142 CONN. 136

> "damages are essential element of plaintiff's proof and must be shown with reasonable certainty."

The illegal entrapment caused by illegal and unauthorized prejudgment denial of Petitioners' property would not have been possible if the said Connecticut Statutes afforded the said Due Process Protections that are Constitutionally required and the Respondent's attorney would not have been able to act in misconduct by issuing the said illegal writs of attachment and instituting the said invalid state action against the Petitioners for acts of the Petitioners that were acts of fundamental right, Constitutionally protected, and, therefore immune from state court prosecution.

The Petitioners' act of purchasing and owning real estate, and the Petitioner's act as a real estate broker, in com-

pliance with real estate regulations, statutes, custom and usage, of failing to legally convey the Respondent's alleged oral offer; were clearly acts of fundamental liberty protected by the Constitution as in WALL v KING 206 F2d 882

"the liberty mentioned in the fourteenth amendment means, not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned."

and in CULP v UNITED STATES 131 F2d 98

"The right to the enjoyment of life and liberty and the right to acquire and possess property are fundemental rights of the citizens of the several states and are not dependent upon the Constitution of the United States or the Federal Government for their existence. HODGES v UNITED STATES, 203 U.S. 1,15, 27 S. CT. 6, 51 L.ED. 65. The due process of the Fourteenth Amendment, however, proscribed state action which deprives a person of his fundemental rights without due process of law. The words of the Amendment are prohibitory, "but they contain a necessary implication of a positive immuni-

ty or right. " STRAUDER v WEST VIRGINIA, 100 U.S. 303,307,310, 25 L.ED. 664. " A right or an immunity, whether created by the Constitution or only guaranteed by it,even without any express delegation of power may be protected by Congress. STRAUDER v WEST VIRGINIA, SUPRA,100 U.S. page 310; UNITED STATES v REESE, 92 U.S. 214,217, 23 L.ED. 563. The States, in adopting the Fourteenth Amendment,expressly delegated to Congress the power to provide for the enforcement of its provisions by appropriate legislation. Section 52, 18 U.S.C.A. Sec. 20 of the Criminal Code, was enacted in the exercise of that power."

The Petitioner's right to remove the state case under said circumstances was made clear by the authority of ROGER v CITY OF TUSCALOOSA 353 F2d 78 (1965)

"if state court prosecutions were in reality, prosecutions of defendants for acts done in exercise of their federally protected Constitutional Rights, defendants would have right to have cases removed to Federal Court for trial,and defendants would also have right to have Federal Court ascertain and fix proper amount of bail 28 U.S.C.A. 1443."

The misconduct of Respondent's attorney was further apparent by his attempted effort to secure authorization of Connecticut's new statute's Section 7,at a time when the state case was before the appeal court,by his Motion in state court with attested representation that" there was probable cause that judgment would render in the state court matter in favor of the

Respondents," while as an attorney, he had knowledge that the said state case was groundless and invalid, and as an officer of the court, he had the responsibility to be truthful of the real status of the state action with obligation to terminate the real estate attachments that he knew were illegally secured and maintained.

The facts apparent on the face of the records reveal that the Respondent's transparent purpose was to use the power of state authority to force the Petitioners to pay the demands of monatary settlement for the freedom of property rights that were illegally secured and unconstitutionally maintained.The Respondent, a policeman, apparently influenced his attorney to institute the state case and to cause the pressure of prejudgment denial of property by real estate attachment to bear. The said attorney's influence obviously reached the deputy sheriff who executed the illegal real estate attachments and the said attorney's influence obviously reached the court system inasmuch as the Petitioners have been unable to secure a fair and impartial hearing on the merits to date.

These illegal acts of prejudice under the pretext of the process of Law by State Authority are contrary to the concepts of Justice and the Due Process Protections that are Constitutionally Required and could not have occured in the presence of Due Process.

The said acts of the Respondent's attorney under such circumstances was a

blatant, improper and illegal use of state authority that constitutes interference of justice and violation of federal statutes 42 U.S.C.A. 1983,1985 and federal criminal statute 18 U.S.C. 241.

Under such circumstances, prosecution of the state action is not legally available to the Respondents as in DOMBROWSKI v PFISTER 380 U.S. 479 (1965),

"Where threats of enforcement are without expectation of Conviction and are part of a plan to employ arrests, seizures, and threats of prosecution under color of statutes to harass, it is obvious, that defense in a state prosecution will not suffice to avoid irreparable injury. The very prosecution is said to be a part of the unconstitutional scheme and the scheme including future use of the statutes are quite irrelevant to the prosecution."

and in COX v LOUISIANA 348 F2d 750(1965),

"On the merits, under circumstances such as those present in this case,appellants conviction cannot be sustained, the police and officials were guilty of an indefensible sort of entrapment."

"The district attorney's transparent purpose is to harass and punish the Petitioner for his acts and to deter him from exercising his Right."

"A Civil Complaint asserting such an abuse of the prosecutorial function would state a claim under the Civil Rights Act 42 U.S.C.A. 1983 and justify

injunctive relief."

"Where state under pretext of prescribing law and order, uses local laws valid on their face to harass and punish citizens for exercise of their Constitutional Rights or federally protected statutory rights, general principle that United States Courts usually should refrain from interfering with state courts enforceing local law, must yield to exception,28 U.S.C.A. 1443(1), 42 U.S.C.A. 1983.

The Appeal Court's decision to deny Removal by affirming the District Court's decision to Remand the state case back to state court which was absent jurisdiction, was further in conflict with the Supreme Court decisions of GEORGIA v RACHEL 384 U.S. 804 (1965) and HAMM v CITY OF ROCK HILL 379 U.S. 306 (1964)

"Congress while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the state's obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State Tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all ... except that of the Supreme Court ... because state courts are required to protect federally created rights. Nevertheless, the power of Congress to pro-

vide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting 1443 (1)."

"It is to be observed that (641) gives the right of removal only to a person who is denied, or cannot enforce in the judicial tribunals of the state, his equal civil rights and this is to appear before trial. When a statute of the state denies his right or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decision, and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of Section 641 presently known as 1443 (1)."

The theory that federal courts must abstain from state court proceedings was a central issue in the said LYNCH case in which the Supreme Court determined that "State Court Proceedings" under Connecticut Attachment Statue 52-279 were non-existant. The Circumstances of the instant Removal Action reveals that "State Court Proceedings", although statutorily authorized, have not yet occured under Connecticut's new attachment statute 73-431 and as in MARSHALL v SAWYER 301 F2d 639 (1962),

"The abstention doctrine does not permit federal district courts to defer to state courts for the decision of federal Constitutional Questions."

The said deprivation of Constitutional Rights have caused the destruction of Pe-

tioner's business and has caused and is causing the irreparable injury of Petitioner's said Constitutional Rights of Due Process and Equal Protection under the Law.

The Petitioners believe that the Supreme Court has the power to grant removal to determine the questions presented for review and upon such determination to restore the Petitioner's freedom of property rights by ordering that the invalid state case be dismissed and that the illegal prejudgment denial of property cease and desist.

The Petitioners will be subjected to further irreparable injury if the said state case is permitted to proceed under the said circumstances, and the Petitioners pray that the Honorable Supreme Court will grant Writ of Certiorari.

Respectfully Submitted,

Clifford R. Burgess
CLIFFORD R. BURGESS

Dorothy F. Burgess
DOROTHY F. BURGESS

Petitioners, Pro Se

RESUME OF LOWER COURTS' OPINIONS & RULINGS

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

Feb. 1, 1974 .. Order of District Court To Remand State Case, Affirmed.

Feb. 26, 1974 .. Petition for Rehearing of the Judgment, Denied.

March 19, 1974 .. Petition to stay the Mandate for Certiorari Petition, Denied.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

June 27, 1973 .. Removal of State Civil Case, Ordered Remanded to State Court.

COPY OF OPINIONS AND JUDGMENTS DELIVERED
IN THE COURT BELOW

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD FABRIZI, ET AL,
Plaintiffs
VS. CIVIL No. B-792
CLIFFORD R. BURGESS,
ET AL, Defendants

RULING ON PLAINTIFFS' MOTIONS
FOR REMAND AND FOR INJUNCTION

Defendants' third removal of this bitterly contested state court litigation is patently untimely, it being apparent from thorough review of the file -- and virtually conceded by defendants -- that there has been no new development in the suit within thirty days prior to the filing of the current removal petition "from which it may first be ascertained that the case is one which is or has become removable." Cf. 28 U.S.C. 1446 (b). Indeed, the petition and defendants' brief in opposition to remand disclose at best a continuing misapprehension of the narrow scope of federal removal jurisdiction; defendants' contentions in support of removal, while diligently refined with the passage of time, have been carefully examined and found insufficient in two prior rulings of this Court. See Fabrizi v. Burgess, Civil No. B-598 (D.Conn.Nov. 20, 1972); Fabrizi v. Burgess, Civil No. B-716 (D. Conn. May 4, 1973. This latest petition is therefore not only untimely,

but also effected removal "improvidently and without jurisdiction"; Plaintiffs' motion for remand is accordingly granted, and the instant action is hereby ordered remanded forthwith to the Superior Court for Fairfield County at Bridgeport, Connecticut. Cf. 28 U.S.C. 1447 (c).

In the circumstances presented, plaintiffs' attendant requests for an award of attorney's fees as "costs" and for an injunction against any further removal deserve full consideration. It is doubtful, however, that the discreation to impose costs conferred by 28 U.S.C. 1447(c) permits the taxing of counsel fees, and the Court's policy has been in any event to withhold any grant of costs absent a removal in bad faith. See Algonquin Gas Transmission Co. v. Gregory, 105 F. Supp. 64,67 (D. Conn. 1952) (Hincks, J.). Defendants' persistence to date is not to be equated with a lack of good faith. Nor may it be simply assumed that defendants will betray the equivalent attitude of sheer obstinacy hereafter in seeking yet another removal, and the flat prohibition of future removal under any circumstances as also urged by plaintiffs would be contrary to express statutory provision of a limited right to delayed removal, Cf. 28 U.S.C. 1446 (b). Remand is therefore to be without costs, and the pending motion for injunctive relief is hereby denied.

The possibility that this suit will become removable in the course of further state court proceedings is certainly remote. Since this Court may on its own initiative order remand of an erroneously removed state court proceeding, see,e.g.,

Connecticut v. Townsend, Crim. No. 12,882 (D. Conn. July 21, 1971, in the interests of sound judicial administration and in view of the history of the instant action the Clerk is hereby directed to refer any petition for removal of the litigation filed hereafter to the prompt attention of the undersigned United States Magistrate or any judge of the Court.

Dated at New Haven, Connecticut, this 27th day of June 1973.

Arthur H. Latimer
United States Magistrate

UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the First day of February, one thousand nine hundred and seventy four.

Present:

Hon. Sterry R. Waterman, Circuit Judge
Hon. William Hughes Mulligan, Cir. Judge
Hon. Frederick vP. Bryan, District Judge

Ronald Fabrizi, et al,
Plaintiff-Appellees,
v.
Clifford R. Burgess, et al
Defendant-Appellants

73-2154

Appeal from the United States District Court for the District of Connecticut.

This Cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

CONNECTICUT'S NEW PREJUDGMENT ATTACHMENT STATUTE

P.A. 73-431 January Session 1973

REMEDIES -- PREJUDGMENT REMEDIES

Substitute House Bill No. 9237

PUBLIC ACT NO. 73-431

An Act concerning prejudgment remedies.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1.

The following terms, as used in sections 1 to 6, inclusive, shall have the following meanings, unless a different meaning is clearly indicated from the context:

(a) "Commercial transaction" means a transaction which is not a consumer transaction.

(b) A "Consumer transaction" means a transaction in which a natural person obligates himself to pay for goods sold or leased, services rendered or monies loaned for personal, family or household purposes.

(c) "Person" means and includes individuals, partnerships, associations and corporations.

(d) "Prejudgment remedy" means any remedy or combination of remedies that enables a person by way of attachment, foreign attachment, garnishment or replevin to deprive the defendant in a civil action of, or affect the use, possession or enjoyment by such defendant of his property prior to final judgment but shall not include a temporary restraining order.

(e) "Property" means any present or future interest in real or personal property, goods, chattels or choses in action whether such is vested or contingent.

Sec. 2.

Notwithstanding any provision of the general statutes to the contrary, no prejudgment remedy shall be available to a person in any action at law or equity unless he has complied with the provisions of this act except an action upon a commercial transaction wherein the defendant has executed a waiver as provided in section 6 of this act.

Sec.3.

A. Except as provided in Sections 5 and 6 of this act, any person desiring to secure a prejudgment remedy shall attach his proposed unsigned writ, summons and complaint to the following documents:

(a) An application, directed to the court to which such action is made returnable, for the prejudgment remedy requested;

(b) An affidavid sworn to by the plaintiff or some competent affiant setting forth a statement of facts sufficient to show that there is probable cause that judgment will be rendered in the matter in favor of the plaintiff;

(c) A form of order that a hearing be held before the court or a judge thereof to determine whether or not the prejudgment remedy requested should be granted and that notice of such hearing be given to the defendant;

(d) A form of summons directed to a proper officer commanding him to serve upon the defendant at least four days prior to the date of the hearing, pursuant to the law pertaining to the manner of service of civil process, the application, a true and attested copy of the writ, summons and complaint, such affidavit and the order and notice of hearing;

(e) The application, order and summons shall be substantially in the form following:

(This Section of forms, omitted by the Petitioners.)

B. The clerk upon receipt of all such documents in duplicate, if he finds them to be in proper form, shall fix a date for the hearing on the application and sign the order of hearing and notice except that if the application includes a request for a temporary restraining order, the court or a judge of the court shall act on the application for the

temporary restraining order, fix a date for the hearing on the prejudgment remedy and sign the order of hearing and notice. The entry fee shall be then collected and the duplicate original document shall be placed in the court file.

C. The clerk shall deliver to the applicant's attorney the original of such documents for service. Service having been made, such original documents shall be returned to such court with the endorsement by the officer of his doings.

Sec. 4.
The defendant shall have the right to appear and be heard at the hearing. The hearing shall be limited to a determination of whether or not there is probable cause to sustain the validity of the plaintiff's claim. If the court, upon consideration of the facts before it, finds that the plaintiff has shown probable cause to sustain the validity of his claim, then the prejudgment remedy applied for shall be granted as requested or as modified by the court. The clerk shall deliver to the applicant's attorney the proposed writ, summons and complaint for service of process. If the court denies the application, only a summons and complaint may be served. In either event, the plaintiff may alter the return date of the writ, summons and complaint or the summons and complaint, as the case may be. No additional entry fee shall be collected upon the return of such action to court. If the plaintiff does not serve the writ, summons and complaint, he shall upon request, be reimbursed the entry fee.

Sec. 5.
The Court or a judge of the court may allow the prejudgment remedy to be issued by an attorney without hearing as provided in sections 3 and 4 of this act, upon verification by oath of the plaintiff or some competent affiant, that there is reasonable likekihood that the defendant

(a) neither resides in nor maintains an office or place of business in this state or

(b) has hidden or will hide himself so that process cannot be served on him or

(c) is about to remove himself or his property from this state or

(d) is about to fraudulently dispose of or has fraudulently disposed of any of his property with intent to hinder, delay or defraud his creditors or

(e)has fraudulently hidden or withheld money, property or effects which should be liable to the satisfaction of his debts or

(f) has stated he is insolvent or has stated he is unable to pay his debts as they mature.

The defendant appearing in such action may move to dissolve or modify the prejudgment remedy granted pursuant to this section in which event the court shall proceed to hear and determine such motion expeditiously. If the court determines at such hearing requested by the defendant that there is probable cause to sustain the validity of the plaintiff's claim, then the prejudgment remedy granted shall remain in effect. If the court determines there is no such probable cause, the pre-

judgment remedy shall be dissolved. An order shall be issued by the court setting forth the action it has taken.

Sec. 6.
In an action upon a commercial transaction, as defined in section 1 of this act, wherein the defendant has waived his right to a notice and hearing under the act, the attorney for the plaintiff shall issue the writ for a prejudgment remedy without securing a court order provided that the complaint shall set forth a copy of the waiver.

Sec. 7.
A plaintiff who has secured a prejudgment remedy prior to the effective date of this act may make a motion to the court in which such action is pending for a hearing as set forth in section 4 of this act with notice thereof to the defendant or his attorney. If the court, upon consideration of the facts before it finds that the plaintiff has shown probable cause to sustain the validity of his claim, such prejudgment remedy secured shall be effective from the date of such hearing and an order to that effect shall be issued by the court.

Sec. 8.
This act shall take effect from its passage.
Approved May 30, 1973.